

BY ELECTRONIC FILING.

September 23, 2022

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The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
September 23, 2022
Part of
Public Record

Dear Ms. Brown

Re: Response to the Board's Memorandum of September 7, 2022 and CP Railway's correspondence of September 12, 2022 - Finance Docket No. 36500, Canadian Pacific Ry. – Control – Kansas City Southern.

I write this letter in response to the Board's Memorandum of **September 7, 2022** regarding its designation of my clients' June 7, 2022 whistleblower filing as an *ex parte* submission, and CP Railway's letter of **September 12, 2022** to the Board. Again, the complainants accept that the STB established its rules and procedures to facilitate a fair, orderly, rigorous, and transparent merger review process. The complainants also understand that the Board's enabling statute, from which its rules and procedures derive, govern all the Board's business, including the current merger process.

Specifically, Title 49 U.S.C. § 721 and § 10101, empowers the Board, (8) to operate transportation facilities and equipment without detriment to the **public health and safety**; and (9) to encourage **honest** and efficient **management** of railroads. The complainants respectfully request that in light of a) these statutory objectives, b) the unprecedented nature of the pending merger in the USMCA era, and c) the likelihood that the Board established its rules for this process while unaware of the national interests that the complainants are raising, that the Board accepts and reviews their resubmitted whistleblower alert on its merits. This includes providing any procedural accommodations or exemptions to remove any impediments to the Board's consideration of the important questions that have a potentially serious impact on American interests. The Board can fashion a process that allows these important issues to be considered while being fair to CP Railway,

the parties of record, and the American public that will be impacted by these issues if the STB approves the merger.

Response to CP Railway's correspondences of September 12, 2022.

In its September 12, 2022, letter to the Board, CP Railway's **first** objection was about the complainants' June 7, 2022, *ex parte* submissions to the STB, which the recent public filing and formal service to the parties of record has remedied. It was the complainants' understanding that as a United States' statutory tribunal with a public interest mandate, the STB could accept whistleblower alerts on any issue within its jurisdiction. This includes questions of public safety and the governance of railroads in the United States, which lie at the centre of the whistleblower alert.

CP Railway's **second** objection is that the complainants did not formally file their June 7, 2022 submissions with the Board, which again, is remedied by the complainants' resubmission through the Board's designated portal and service to the parties. Further, the resubmitted alert elaborates on the inevitable timing of these submissions and why the complainants had legitimate reasons for not applying to be parties of record by the December 2021 deadline.

CP Railway's **third** objection is that the material that the complainants filed in their June 7, 2022, submissions do not have any legitimate relationship to the issues in this proceeding. It appears that CP Railway did not carefully review the materials, instead, focusing solely on Runyowa Law's representation of victims whose loved ones died at CP Railway and CN Railway in Canada. A closer examination of the initial whistleblower alert clearly shows that the issues were far broader, and raises serious questions about CP Railway's corporate governance, policing activities, and public safety **in the United States**. The events in Canada only provide context, including on how the complainants learned about the issues and their cross-border implications in the United States.

As is evident in the resubmitted whistleblower alert, which includes supporting records that the Board was unable to post with its September 7, 2022 Memorandum, **most** of the issues do not relate to the Field, British Columbia derailment, the incident that occasioned Runyowa Law's representation of some of the complainants in Canada. To the extent that the incident arises, it is to pinpoint potentially systemic safety concerns arising from CP Railway's precision scheduled railroading practices, a business model it also employs in the United States.

With respect to CP Railway's objection that the issues the complainants raised have no bearing on the merger, the complainants will leave it to the Board to verify that the entirety of their re-submission relates to the **unprecedented implications in the United States of approving a**

merger that would endorse, entrench, and extend CP Railway's policing/security footprint deeper into the country and across the USMCA region.

Finally on this point, CP Railway focuses on the fact that Runyowa Law represents families who are engaged in litigation against CP Railway and CN Railway. That has never been in dispute. What is **not** correct is CP Railway's assertion that the STB should disregard the complainants' submissions because they are allegedly trying to "hijack" the merger to gain "leverage" in their civil litigation against CP Railway in Canada. This assertion has no merit for the following reasons.

- A) CP Railway is effectively arguing that notwithstanding any legitimate interests that the Board and American public may have in the issues the whistleblower alert raises, the STB must nevertheless disregard the issues **because** of the potential ancillary impacts on CP Railway in proceedings that fall outside the Board's jurisdiction. Such a position is untenable. The only consideration should be the **independent merits of the complaint and the Board's jurisdiction over the issues**. In any event, if CP Railway has nothing to hide, it should not fear that the Board's transparent consideration of the issues in the complainants' whistleblower alert will unearth unfavourable truths that could give the complainants any "leverage".
- B) Contrary to CP Railway's position, no public body should subordinate its statutory powers and mandate to protect or impede the private interests of any parties, let alone in private, foreign litigation. The Board's decisions may have that impact in result, but not in motivation. Additionally, unless expressly limited by law or adjudicative rulings, litigants can, and often, rely on documents arising from regulatory proceedings. It would set a troubling precedent if tribunals routinely decided if to exercise their jurisdiction based on whether any party could "leverage" the proceeding to advance unrelated goals (especially in a foreign country).
- C) Formal whistleblower programs and other public complaints systems accept the reality that many whistleblowers become aware of reportable wrongdoing during disputes with the parties they are reporting about. There is no question that the complainants are engaged in civil litigation against CP Railway and CN Railway in Canada. But-for the complainants' personal tragedies that triggered their disputes with these railroad companies, they would not have uncovered the materials that authorities in both Canada and the United States appear to have been unaware of. **Whistleblowers play a vital role in ensuring transparency and accountability in democratic societies. They occupy vantage points that allow them to discover threats and wrongdoings that official guardians of the public interest cannot see and may not even know exist.** Whistleblowers can save public authorities time and resources by marking the "X" in the haystack to save officials the burden of examining every straw to find the needle. Therefore, it would set a damaging precedent to impose a "demonstrated **disinterest**" test on whistleblowers and other complainants who bring serious

and legitimate issues to the attention of public authorities such as the STB. It would also discourage whistleblowers from coming forward given the risks of exposing themselves and then being disregarded because of their alleged motivations for reporting.

The only relevant consideration is the inherent credibility and merits of a whistleblower complaint. Does it provide threshold evidence or raise sufficiently troubling questions about issues within the Board's jurisdiction or mandate? If the answer is, yes, then the complaint should be considered on its merits and in the interests of all stakeholders.

D) CP Railway incorrectly asserted that the Alberta Court ruled against Ms. Desrochers in *Desrochers v. CP Railway*. In fact, that litigation is ongoing and Runyowa Law is engaged with CP Railway's Canadian counsel on that matter. What CP Railway neglected to state was that the Court merely denied Ms. Desrochers' the **interim** remedy of enjoining the 2022 annual shareholder meeting until the Court could adjudicate the underlying merits of the dispute under [Section 137\(5\)\(b\) of the Canadian Business Corporations Act](#). **The Court did not adjudicate the underlying merits of shareholder proposals or any of the issues in the complaints' whistleblower alert.** The ongoing proceedings are to lay the foundation for a hearing on the merits to determine whether Ms. Desrochers' proposals should be included in CP Railway's **2023** management information circular to shareholders. The STB should also note that the shareholder proposals refer to very issues regarding CP Railway's cross-border policing activities and the corporation's duty to make material disclosures to regulators in the United States and Canada. The complainants' efforts to bring this and other issues to the STB's attention through a whistleblower alert is a prudent and valid step, not "hijacking".

The complaints have served the parties of record with this correspondence and their re-submitted whistleblower complaint by email.

Thank you,



Tavengwa Runyowa

(Canadian legal counsel for Ms. Lorelei Desrochers, Ms. Pamela Fraser, Mr. Edward Dockrell, and Ms. Heather Dockrell).